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**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

**CV 18 80 175 MISC TSH**

In re:

SUBPOENAS TO PRODUCE DOCUMENTS,  
INFORMATION, OR OBJECTS TO MUDDY  
WATERS CAPITAL LLC, MLAF LP, AND  
SS&C TECHNOLOGIES, INC.

Underlying Case: *In re Banc of California  
Securities Litigation*, 17-cv-00118 (C.D. Cal.)

Case Number: Misc. No. \_\_\_\_\_

**NOTICE OF MOTION AND MOTION  
OF NONPARTIES MUDDY WATERS  
CAPITAL LLC, MLAF LP, AND SS&C  
TECHNOLOGIES INC. TO QUASH  
SUBPOENAS**

Date: TBD  
Time: TBD  
Judge: TBD  
Dept.: TBD

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1 **NOTICE OF MOTION AND MOTION**

2 PLEASE TAKE NOTICE that as soon as counsel may be heard in the United States District  
3 Court for the Northern District of California, Movants Muddy Waters Capital LLC, MLAF LP,  
4 and SS&C Technologies, Inc. will, and hereby do, move the Court for an order quashing three  
5 subpoenas that Defendant Steven Sugarman issued in the underlying case *In re Banc of California*  
6 *Securities Litigation*, No. 17-cv-00118 (C.D. Cal.). This motion is made pursuant to Rules 26 and  
7 45 of the Federal Rules of Civil Procedure.

8 This motion is based on this Notice of Motion and Motion, the supporting Memorandum  
9 of Points and Authorities, the attached exhibits, and any other matter which may be submitted at  
10 the hearing.

11 **STATEMENT OF THE ISSUES**

12 Should the Court quash the subpoenas served on Muddy Waters Capital LLC, MLAF LP,  
13 and SS&C Technologies, Inc. under Federal Rule of Civil Procedure 45 because the subpoenas  
14 subject Movants to undue burden by seeking irrelevant, overbroad, and confidential information.  
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## MEMORANDUM OF POINTS AND AUTHORITIES

This motion seeks to quash subpoenas served on three nonparties to a securities class action in which they have no involvement. *See* Exhibits A-C. The nonparties were simply investors in the securities at issue in the underlying case. The subpoenas are comprised of extraordinarily broad, burdensome, and invasive requests seeking a wide array of information unrelated to the underlying claims or defenses. They are thus improper efforts to conduct fishing expeditions into the confidential business activities of non-parties, and any potential relevance to the underlying litigation is tenuous at best and would be far outweighed by the substantial burdens they would impose on companies with no involvement in the conduct at issue. Movants respectfully request that this Court quash the subpoenas in their entirety for the reasons explained below or, in the alternative, transfer this motion to the issuing court.

### I. BACKGROUND

In the underlying case, Lead Plaintiff Iron Workers Local No. 25 Pension Fund (“Plaintiff”) filed suit against Defendants Banc of California, Inc. (“Banc”) and Steven Sugarman (“Sugarman”), Banc’s former CEO and Chairman of the Board (together, “Defendants”), in the U.S. District Court for the Central District of California. *See In re Banc of California Secs. Litig.*, No. 17-cv-00118 (C.D. Cal. May 31, 2017) (the “Class Action”). The Class Action Complaint alleges, among other things, that Defendants violated federal securities laws by disseminating false and misleading statements to the investing public. *See generally* Complaint (Exhibit D). In particular, the Complaint alleges that then-CEO Sugarman’s biography in the Banc’s proxy statements misleadingly omitted information about his business connections with Jason Galanis, who had pled guilty to securities fraud. Banc shares fell significantly when an anonymous short seller identified as “Aurelius” published a blog post on October 18, 2016 citing numerous publicly available sources exposing financial ties between Sugarman, other Banc directors, and Galanis.

1 The court denied Defendants' motions to dismiss last year, *see In re Banc of California Secs. Litig.*,  
 2 No. 17-cv-00118, 2017 WL 3972456 (C.D. Cal. Sept. 6, 2017), and the case is in discovery.

3 Nonparty Muddy Waters Capital LLC ("MWC") is an investment adviser based in San  
 4 Francisco, California. Nonparty MLAF LP ("MLAF") is a San Francisco-based hedge fund  
 5 launched and managed by MWC, which invests in public equity markets. Nonparty SS&C  
 6 Technologies, Inc. ("SS&C") is a provider of investment and financial software-enabled services;  
 7 it provides fund administration services for MWC and MLAF, including accounting, treasury, and  
 8 investor services, among others. MWC, MLAF, and SS&C (together, "Movants") are not parties  
 9 to the Class Action and had no involvement in that litigation until Defendant Sugarman served  
 10 them with substantially identical Subpoenas to Produce Documents, Information, or Objects on  
 11 September 11, 2018 (collectively, the "Subpoenas"). *See* Exs. A-C. Movants are not mentioned in  
 12 the Complaint and had no involvement in the allegations that give rise to the securities claims at  
 13 issue in the Class Action.  
 14

15  
 16 The Subpoenas seek the following information from Movants from the period of October  
 17 1, 2015 to April 30, 2017:

- 18 1. All of Movants' communications with the Banc.
- 19 2. All documents reflecting Movants' transactions in securities of the Banc.
- 20 3. All documents relating to Movants' decision to enter into any transactions in
- 21 securities of the Banc.
- 22 4. All documents or communications relating to a blog post concerning the Banc,
- 23 including communications with its anonymous author ("Aurelius") or the
- 24 website Seeking Alpha.
- 25 5. All documents relating to communications between Movants and any other
- 26 third parties regarding Defendants or the blog post.
- 27 6. All communications relating to Galanis, a non-party with whom Defendants are
- 28 alleged to have been in contact with.
7. All communications between Movants and third parties, COR Clearing and  
 COR Securities, relating to Defendants.



1 8. All communications between Movants and Plaintiff's counsel in the Class  
2 Action.

3 9. All correspondence with various individuals alleged to have had involvement  
4 with Defendants.

5 10. All of Movants' investors who held securities of the Banc on October 18, 2016.

## 6 **II. JURISDICTIONAL STATEMENT**

7 The Subpoenas were issued by the U.S. District Court for the Central District of California  
8 and call for the production of documents to the office of issuing counsel in San Francisco,  
9 California. Pursuant to Federal Rule of Civil Procedure 45(d)(3), this Court has jurisdiction over  
10 a motion to quash the Subpoenas. Accordingly, this Court has jurisdiction to decide this motion,  
11 but it may instead transfer this motion to the issuing court—*i.e.*, the U.S. District Court for the  
12 Central District of California. Fed. R. Civ. P. 45(f). Movants consent to transfer.

## 13 **III. LEGAL STANDARD**

14 Federal Rule of Civil Procedure 45(d)(3) governs motions to quash a subpoena. It states  
15 that "the court for the district where compliance is required must quash or modify a subpoena that:  
16 (i) fails to allow a reasonable time to comply; ... (iii) requires disclosure of privileged or other  
17 protected matter, if no exception or waiver applies; or (iv) subjects a person to undue burden."  
18 Fed. R. Civ. P. 45(d)(3)(A). Moreover, the court "may ... quash or modify the subpoena if it  
19 requires: (i) disclosing a trade secret or other confidential research, development, or commercial  
20 information." Fed. R. Civ. P. 45(d)(3)(B).

21  
22 "The Ninth Circuit has long held that nonparties subject to discovery requests deserve extra  
23 protection from the courts." *Lemberg Law LLC v. Hussin*, No. 16-cv-80066, 2016 WL 3231300,  
24 at \*5 (N.D. Cal. June 13, 2016) (citation omitted); *see United States v. C.B.S., Inc.*, 666 F.2d 364,  
25 371-72 (9th Cir. 1982). Thus, although the scope of discovery permitted through a Rule 45  
26 subpoena is "the same as" that permitted under Rule 26(b), *see, e.g., Intermarine LLC v. Spliethoff*  
27 *Bevrachtungskantoor BV*, 123 F. Supp. 3d 1215, 1217 (N.D. Cal. 2015), the court must limit  
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1 discovery if “the burden or expense of the proposed discovery outweighs its likely benefit.” Fed.  
 2 R. Civ. P. 26(b)(1).

3 “On a motion to quash a subpoena, the moving party has the burden of persuasion ..., but  
 4 the party issuing the subpoena must demonstrate that the discovery sought is relevant.” *Chevron*  
 5 *Corp. v. Donziger*, No. 12-mc-80237, 2013 WL 4536808, at \*4 (N.D. Cal. Aug. 22, 2013) (citation  
 6 omitted). The “relevance” standard is stricter as applied to nonparties. *See Dart Indus. Co. v.*  
 7 *Westwood Chem. Co.*, 649 F.2d 646, 649 (9th Cir. 1980); *Laxalt v. McClatchy*, 116 F.R.D. 455,  
 8 458 (D. Nev. 1986) (“The standards for nonparty discovery ... require a stronger showing of  
 9 relevance than for simple party discovery.”).

#### 11 IV. ARGUMENT

##### 12 A. The Subpoenas Should Be Quashed Because They Impose an Undue Burden

13 The court must quash a subpoena that subjects a nonparty to undue burden. Fed. R. Civ. P.  
 14 45(d)(3)(A)(iv). A subpoena, in turn, is unduly burdensome if it seeks to compel production of  
 15 documents regarding topics unrelated to or beyond the scope of litigation. *See Mattel, Inc. v.*  
 16 *Walking Mountain Prods.*, 353 F.3d 792, 813-14 (9th Cir. 2003). In addition, “an evaluation of  
 17 undue burden requires the court to weigh the burden to the subpoenaed party against the value of  
 18 the information to the serving party” and requires the court’s consideration of “such factors as  
 19 relevance, the need of the party for the documents, the breadth of the document request, the time  
 20 period covered by it, the particularity with which the documents are described and the burden  
 21 imposed.” *Moon v. SCP Pool Corp.*, 232 F.R.D. 633, 637 (C.D. Cal. 2005) (quotation marks and  
 22 citation omitted). Here, the Subpoenas seek information that is not relevant to the claims or  
 23 defenses in the underlying litigation and do so in a way that is overbroad and burdensome.  
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# 1                    1.        The Subpoenas Seek Irrelevant Information

2            First, this Court should quash the Subpoenas because they target information that is  
 3 irrelevant to Defendants' defenses. "The party issuing the subpoena must demonstrate that the  
 4 information sought is relevant and material to the allegations and claims at issue in the  
 5 proceedings." *Optimize Tech. Sol'ns, LLC v. Staples, Inc.*, No. 14-cv-80095, 2014 WL 1477651,  
 6 at \*2 (N.D. Cal. Apr. 14, 2014) (quotation marks and citation omitted). Thus, once the subpoenaed  
 7 party meets its initial burden, "the burden shifts to the requesting party to show a 'substantial  
 8 need,'" which requires a showing that "the requested discovery is relevant and essential to a  
 9 judicial determination of [the party's] case." *Sci. Games Corp. v. AGS LLC*, No. 17-cv-343, 2018  
 10 WL 2292811, at \*3 (D. Nev. May 18, 2018) (citation omitted).

11            Here, the Subpoenas call for various categories of communications between Movants and  
 12 other nonparties, information concerning Movants' investment decisions, and documents relating  
 13 to the blog post at issue in the Class Action. *See supra* at 3-4. It is difficult to understand how any  
 14 of these materials could be relevant to Defendant Sugarman's claims or defenses.

15            The Class Action concerns alleged misrepresentations or omissions by Defendants—not  
 16 how certain nonparty investors in Banc securities made their investment decisions. Even if it might  
 17 be relevant whether statements in the blog post were in fact true, because they were based on  
 18 publicly available materials (a list of which was disclosed), any internal deliberations of  
 19 investors—which are necessarily nonpublic—could have no bearing on the truth or reliability of  
 20 the blog post. *See In re Banc of California Secs. Litig.*, 2017 WL 3972456, at \*7 ("And a blog  
 21 author, even an anonymous one, who relies on publicly filed documents doesn't raise the same  
 22 concerns about unreliability as a confidential informant. Particularly when, as here, the author later  
 23 released a list of all the documents that were the sources of the blog post."); *In re Biovail Corp.*  
 24 *Secs. Litig.*, 247 F.R.D. 72, 74 (S.D.N.Y. 2007) ("[I]f those statements were false, it can prove  
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1 their falsity from *its* own records. Thus Biovail does not need discovery from these non-parties to  
 2 prove whether or not the reports of David Maris, for example, are false. Either they are or they  
 3 aren't. Given that the discovery as sought could cost millions of dollars. . . , the burden of  
 4 production far outweighs any probative value.”).

5  
 6 Even if Sugarman’s theory is that nonparty short sellers drove Banc’s stock price down  
 7 based on false information or market knowledge prior to the blog post, that too should be proven  
 8 based on the truth of the statements in the blog post itself—falsity and materiality would not  
 9 depend on nonpublic information, such as the nonparties’ private communications, confidential  
 10 analysis, or anonymous investors. So the Subpoenas do not seek information that is relevant to the  
 11 truth or falsity of the blog post. *Cf. Aurelius v. BofI Fed’l Bank*, No. 16-mc-71, 2016 WL 8925145,  
 12 at \*3 (C.D. Cal. Sept. 20, 2016) (“Significantly, these postings describe in detail the facts upon  
 13 which the opinions are based.”). In *Aurelius*, the defendant issuing the subpoena suspected that  
 14 nonparties were involved in a “short and distort” stock manipulation scheme and issued a subpoena  
 15 to unmask the identity of Aurelius. The court granted Aurelius’s motion to quash the subpoena,  
 16 holding that “innuendo” and allegations of coordination based on the “timing” of certain events  
 17 and statements, without more, failed to demonstrate a need for the evidence sought. *Id.* So too  
 18 here.  
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20  
 21 Nor do the Subpoenas seek information that is necessary to prove or disprove loss  
 22 causation. That issue depends on whether the blog post led to a decline in the stock price. Movants’  
 23 subjective views regarding Banc securities, and the nonpublic communications and research on  
 24 which those views were based, do not bear on loss causation; the change in the stock price is all  
 25 that is needed. *Cf., e.g., Audio MPEG, Inc. v. HP Inc.*, No. 16-mc-80271, 2017 WL 950847, at \*3-  
 26 \*4 (N.D. Cal. Mar. 10, 2017) (“[T]he motivations of a non-party are irrelevant to whether the  
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1 parties are liable for antitrust violations... A non-party's motivations and understanding of its  
 2 relationship with a party accused of monopolization has no bearing on any of these elements.”).

3 The issuing court noted in denying Defendants' motions to dismiss that the Complaint is  
 4 based not only “on the opinion of the blog post's author that Banc was ‘un-investible’” but that it  
 5 “relies much more on the factual conclusions that led to the author's overall opinion.” *In re Banc*  
 6 *of California Secs. Litig.*, 2017 WL 3972456, at \*10. The court also noted that it was “reluctant to  
 7 call the SEEKINGALPHA blog post no more than an opinion piece” due to “the author's later  
 8 revelation of his numerous sources.” *Id.* It is those publicly available sources—and the truth or  
 9 falsity of the statements in the blog post—that may bear on the issues in the Class Action. The fact  
 10 that the alleged fraud “was revealed by a short-seller” is not itself a factor that would bear in any  
 11 way on loss causation, particularly in an efficient market. To the extent that Sugarman suspects  
 12 that Banc securities were targeted by nonparty research analysts and investors, activist short-  
 13 selling is entirely legal and actually beneficial to markets. *See infra* at 17. And to the extent that  
 14 Sugarman complains of alleged market manipulation, such accusations are unfounded and in any  
 15 event, they are the province of regulators (who have raised no such concerns). Sugarman's hope  
 16 that this nonparty discovery may somehow support his theory or at least generate additional leads  
 17 for further discovery is not sufficient to establish relevance. Thus, the Subpoenas should be  
 18 quashed because they seek information that is not relevant to the Class Action.

## 22 2. The Subpoenas' Requests Are Overbroad

23 The Subpoenas also impose an undue burden on Movants because they are wildly  
 24 overbroad. A party may not use the subpoena process to engage in a fishing expedition. *See Rivera*  
 25 *v. NIBCO, Inc.*, 364 F.3d 1057, 1072 (9th Cir. 2004) (“District courts need not condone the use of  
 26 discovery to engage in ‘fishing expeditions.’”) (citation omitted).

1 To start, Request No. 1 seeks “All COMMUNICATIONS with BANC.” Ex. A, at 13. Such  
 2 discovery should be sought in the first instance from the parties themselves—*i.e.*, Defendant  
 3 Banc—rather than by burdening nonparties. “In determining whether the subpoena should be  
 4 enforced, the Court is guided by not only Federal Rule of Civil Procedure 45(c)(3)(A)(iv) which  
 5 protects subpoenaed parties from ‘undue burden’ but also Rule 26, which provides, *inter alia*, that  
 6 a court may limit discovery if ‘the discovery sought ... is obtainable from some other source that  
 7 is more convenient, less burdensome, or less expensive.’” *Nidec Corp. v. Victor Co. of Japan*, 249  
 8 F.R.D. 575, 577 (N.D. Cal. 2007) (quoting Fed. R. Civ. P. 26). In *Nidec*, the discovery request was  
 9 quashed because “the vast majority of the discovery sought from [the nonparty] is discovery  
 10 obtainable from a source more direct, convenient, and less burdensome—namely, from  
 11 Defendants.” *Id.* The fact that Sugarman did not obtain this information from his co-Defendant  
 12 and instead demands it from multiple nonparties suggests that he made little or no effort to frame  
 13 the requests narrowly.

16 More importantly, the overbreadth of the Subpoenas speaks for itself. For example,  
 17 Request No. 5, seeks “All DOCUMENTS that refer, reflect or relate to COMMUNICATIONS  
 18 between YOU and any third party regarding BANC, SUGARMAN, GALANIS, ALLEGED  
 19 GALANIS ENTITY, the BLOG, or AURELIUS, including without limitation  
 20 COMMUNICATIONS between YOU and any of the following people or entities ....” Ex. A, at 15.  
 21 It goes on to list 25 entities or individuals involved in trading Banc securities, five entities or  
 22 individuals relating to a Bloomberg news article, and 20 entities or individuals involved in  
 23 diligence or communications with Banc. *Id.* at 15-16. This request alone would require Movants  
 24 to run approximately 50 search terms to capture the names specified in the Subpoenas.

26 Request No. 6 similarly seeks “All COMMUNICATIONS with and DOCUMENTS that  
 27 refer, reflect or relate to GALANIS or any ALLEGED GALANIS ENTITY,” the definition of  
 28



1 which includes some 30 names. *See* Ex. A, at 7-8, 16. Request No. 8 likewise identifies over 15  
 2 law firms, and Request No. 9 lists an additional 12 names of entities or individuals whose  
 3 communications with Movants would be responsive. *Id.* at 16. Compliance with the Subpoenas  
 4 would require Movants to run over a hundred search terms, not to mention the burden and expense  
 5 of attorney review. The expansive wording of the Subpoenas also reflects no effort by Defendant  
 6 Sugarman to limit his requests. *See* Ex. A (using “all,” “any,” and “including without limitation”  
 7 in most of the requests).

9 Such overbroad discovery requests with tenuous relevance at best plainly impose an undue  
 10 burden on nonparties. *Cf., e.g., In re Biovail*, 247 F.R.D. at 74 (“[T]he virtually limitless financial  
 11 and other information Biovail seeks is unnecessary and irrelevant, at least in *this* case, and the  
 12 burden these demands place on the subpoenaed non-parties and diversion of their staff to provide  
 13 it far outweighs any probative value of the information.”); *In re Ashworth, Inc. Secs. Litig.*, No.  
 14 99-cv-121, 2002 WL 33009225, at \*6 (S.D. Cal. May 10, 2002) (“This Court’s review of the  
 15 subpoenas issued to the financial analysts and investment companies reveals that the requests are  
 16 overwhelmingly broad in category and content. As they are phrased, the requests appear, in this  
 17 Court’s view, to seek all documents in the third party financial analysts’ possession that refer to or  
 18 mention Ashworth in any shape or form.”).

20 Moreover, the MWC subpoena purports to require production on behalf of its “employees,  
 21 agents, consultants, representatives, attorneys, and any other persons acting for or on behalf of  
 22 these entities or individuals.” Ex. A, at 11. But issuing counsel went ahead and issued nearly  
 23 identical, and thus redundant subpoenas on MLAF and SS&C.<sup>1</sup> Moreover, no effort was made to  
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26  
 27 <sup>1</sup> As a fund administrator of MWC and MLAF, any responsive materials of SS&C would  
 28 fall into one of two categories: (i) property of MWC and MLAF, and therefore duplicative of the  
 subpoenas served on them, or (ii) materials relating to the administration and financial accounting



1 exclude privileged information from attorneys, which is another basis on which the Subpoenas  
2 should be quashed. *See* Fed. R. Civ. P. 45(d)(3)(a)(iii).

3 Finally, in addition to being defective for all of these reasons, the Subpoenas fail to allow  
4 a reasonable time for compliance. *See* Fed. R. Civ. P. 45(d)(3)(A)(i). The Subpoenas seek the  
5 production of broad categories of documents covering a substantial time period within three weeks  
6 (extended from two weeks by issuing counsel). Three weeks is insufficient time for Movants to  
7 search for, review, and produce the requested information with limited staff and resources.

8 In sum, the Subpoenas must be quashed because they would impose an undue burden on  
9 Movants, seeking broad discovery with minimal relevance to the Class Action that would impose  
10 significant burdens on nonparties. *See, e.g., AngioScore, Inc. v. TriReme Med., Inc.*, No. 12-cv-  
11 03393, 2014 WL 6706873, at \*3 (N.D. Cal. Nov. 25, 2014) (“[T]he Court has weighed the burden  
12 of the subpoenas on non-party Spectranetics against the minimal value of this information to  
13 Defendants and concludes that it poses an undue burden on the non-party.”).

#### 14 **B. The Subpoenas Should Be Quashed Because They Seek Protected Information**

15 This Court should also quash the Subpoenas because they seek information that is protected  
16 from disclosure. “To protect a person subject to or affected by a subpoena, the court for the district  
17 where compliance is required may, on motion, quash or modify the subpoena if it requires ...  
18 disclosing a trade secret or other confidential research, development, or commercial information.”  
19 Fed. R. Civ. P. 45(d)(3)(B); *see also Mattel, Inc. v. Walking Mountain Prods.*, 353 F.3d 792, 814  
20 (9th Cir. 2003).

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28 services SS&C provides for those funds, which are not even tangentially related to the allegations  
asserted in the Class Action. For these reasons alone, the SS&C subpoena should be quashed.

1                   **1. The Subpoenas Seek Confidential Research and Communications**

2           This Court should quash the Subpoenas because they seek a broad array of confidential  
3 information about the inner workings of Movants' businesses, including private communications,  
4 proprietary work product, and sensitive materials concerning investment decisions. A nonparty  
5 resisting such discovery must show that the discovery sought is protected and that it has sought to  
6 maintain its confidentiality. *See, e.g., Compaq Computer Corp. v. Packard Bell Elecs., Inc.*, 163  
7 F.R.D. 329, 338 (N.D. Cal. 1995) ("The Court is persuaded that Acer's procedures for recycling  
8 computer parts do constitute important proprietary information. Further, Acer has made a strong  
9 showing that it has historically sought to maintain the confidentiality of this information.").

10           The Subpoenas at issue here seek precisely this type of information. Request No. 2 seeks  
11 "All DOCUMENTS that reflect YOUR TRANSACTIONS in BANC SECURITIES," including  
12 numerous transaction details, including profits earned. Ex. A, at 14. And Request No. 3 seeks "All  
13 DOCUMENTS that refer, reflect or relate to the basis for YOUR decision to engage in any  
14 TRANSACTIONS in BANC SECURITIES." *Id.* These requests explicitly encompass  
15 communications, analysis, research, and other proprietary and sensitive information about  
16 Movants' businesses.

17           Movants MWC and MLAF are an investment adviser and a hedge fund, respectively, that  
18 focus on research-based short activist investing. The bases on which they make trading decisions  
19 are proprietary and highly confidential. The inner workings of investment firms, including their  
20 research, analysis, communications, strategy, and transactions, should not be susceptible to  
21 discovery in cases in which they have no direct involvement. And just as MWC's and MLAF's  
22 activities are confidential and proprietary, any administration services provided by SS&C in its  
23 capacity as an agent are likewise confidential and outside the bounds of discovery.  
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1                   **2.     The Subpoenas Seek Confidential Information About the Clients of**  
 2                   **Nonparties**

3           This Court also should quash the Subpoenas because they seek confidential information  
 4 not only about Movants themselves, but also about their clients. The Subpoenas seek the identities  
 5 and contact information of direct and indirect investors in MWC, the investment advisor, as well  
 6 as MLAF, which also invests money on behalf of others. This is an apparent effort to obtain leads  
 7 for further discovery. Specifically, Request No. 10 seeks “All INVESTORS in YOU that held  
 8 BANC SECURITIES, either directly or through a fund, as of October 18, 2016, including contact  
 9 information sufficient to identify the principals, addresses, and contact information associated with  
 10 the INVESTOR.” Ex. A, at 16. Not only do such investors have a reasonable expectation to remain  
 11 unidentified in tangential litigation, but Movants should not be required to disclose their investors’  
 12 personal confidential information, particularly where the likely result is that Defendant Sugarman  
 13 will use such information to subpoena those investors.  
 14

15           The disclosure of clients who invest passively could cause significant harm to Movants.  
 16 One of the most important features of investment partnerships like MLAF and MWC’s other  
 17 clients is the ability of individuals and entities to invest anonymously. This is why investment  
 18 managers vigorously protect client confidentiality, which is central to the fiduciary relationship  
 19 between managers and investors. It is why Movants provide repeated assurances to their investors  
 20 of strict confidentiality. For example, MWC states that it shall not “disclose the Investor’s name,  
 21 other identifying information regarding the Investor, or the Investor’s address, to any third party,  
 22 and shall not otherwise disclose, either orally or in writing, any relationship with the Investor using  
 23 the Investor’s name or other identifying information regarding the Investor, for any reason (other  
 24 than as required by law, regulation or legal process), without the prior written consent of the  
 25 Investor.” Movants’ privacy policies reiterate that they “do not disclose nonpublic personal  
 26 information about our clients or former clients to third parties,” except as required by law.  
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Moreover, they advise investors that “[t]o protect your personal information from unauthorized access and use, we use security measures that comply with Federal law. These measures include computer safeguards and secured files and buildings.” To be sure, such provisions allow for exceptions as required by law, which includes subpoenas, but these robust assurances of confidentiality go beyond typical privacy provisions in ordinary commercial contexts. As a result, Movants’ clients have a reasonable expectation that their identities will be protected and that their passive investments managed by MWC will remain confidential. Under these circumstances—and where Movants themselves are nonparties and their conduct is not at issue—courts should ensure that discovery sought from twice-removed nonparties is demonstrably “relevant and material” to the claims at issue in the underlying proceedings. *See Optimize Tech.*, 2014 WL 1477651, at \*2.

Moreover, it is Movants’ understanding that Defendant Sugarman obtained their identities and information about their trading activity in Banc securities from discovery produced by another nonparty, ACS Execution Services LLC (“ACS”), which provides services to Movants, in response to a separate nonparty subpoena. And Sugarman subpoenaed ACS based on information produced by the Financial Industry Regulatory Authority, Inc. (“FINRA”)—another nonparty subject to yet another nonparty subpoena. Thus, it appears to be Sugarman’s intention is to continue issuing nonparty subpoenas, which threatens to harm Movants by subjecting their clients to the burden of being named as unwilling participants in litigation in which they had no involvement or knowledge.

More importantly, FINRA and ACS should not have provided personally identifiable information because such disclosure is inconsistent with the importance FINRA itself attaches to the protection of personal confidential information of investors by broker-dealers and other regulated entities that are required by law to have robust policies, practices, and procedures to protect against unauthorized disclosure. *See, e.g.*, 17 C.F.R. § 248.30 (Rule 30 of REG S-

P). Because private civil litigants lack FINRA's broad regulatory authority, *see, e.g.*, FINRA Rule 8210, it would be an end-run of these privacy protections to permit further disclosure and use of investors' personally identifying information by litigants who happen to obtain such information, which FINRA possesses solely for regulatory purposes and ought not to produce as a nonparty to private civil litigation. Thus, to the extent that Sugarman seeks information from investors who should not have been disclosed in the first place, this Court should not permit such discovery.

### 3. The Subpoenas Seek Information About Anonymous Speakers

Finally, the Subpoenas seek various categories of information relating to the communications and trading activities of anonymous speakers and investors. Investors in Banc securities have a right to remain anonymous, just as a speaker has a First Amendment right to anonymity. *See, e.g., In re Anonymous Online Speakers*, 661 F.3d 1168, 1172-73 (9th Cir. 2011); *Aurelius*, 2016 WL 8925145, at \*2. "It is well established that the First Amendment protects the right to anonymous speech." *Art of Living Found. v. Does 1-10*, No. 10-cv-5022, 2011 WL 5444622, \*3 (N.D. Cal. Nov. 9, 2011) (citing *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342 (1995)); *see also Arista Records, LLC v. Doe 3*, 604 F.3d 110, 118 (2d Cir. 2010) ("To the extent that anonymity is protected by the First Amendment, a court should quash or modify a subpoena designed to breach anonymity."). Among other reasons, investors may include whistleblowers or anonymous authors, such as Aurelius, who seek to expose corporate mismanagement or fraud. Indeed, short selling is not only a legitimate strategy, but one that provides a salutary service by identifying and exposing fraud and other malfeasance by market participants.

Request No. 4 seeks "All DOCUMENTS and COMMUNICATIONS that refer, reflect or relate to the BLOG or AURELIUS." Ex. A, at 14. To the extent that the Subpoenas seek to gather information about the blog post and Aurelius, they constitute an impermissible fishing expedition.



1 See, e.g., *Rivera*, 364 F.3d at 1072. Nonparty discovery cannot be used as a tool to obtain  
 2 information about the identities of anonymous speakers, particularly when Defendants would  
 3 likely not even be able to seek discovery from them directly. See, e.g., *Music Grp. Macao*  
 4 *Commercial Offshore Ltd. v. Does*, 82 F. Supp. 3d 979, 983 (N.D. Cal. 2015) (“[A] party seeking  
 5 to discover the identity of an anonymous speaker must first ‘persuade the court that there is a real  
 6 evidentiary basis for believing that the defendant has engaged in wrongful conduct that has caused  
 7 real harm to the interests of the plaintiff.’”) (quoting *Highfields Capital Mgmt., L.P. v. Doe*, 385  
 8 F. Supp. 2d 969, 975-76 (N.D. Cal. 2005)). Indeed, courts have quashed subpoenas attempting to  
 9 identify anonymous authors of blog posts, including Aurelius himself. See *Aurelius*, 2016 WL  
 10 8925145, at \*3-\*6 (granting a motion to quash by Aurelius); see also *Partington v. Bugliosi*, 56  
 11 F.3d 1147, 1156 (9th Cir. 1995) (“[W]hen a speaker outlines the factual basis for his conclusion,  
 12 his statement is protected by the First Amendment.”).

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 15 As a matter of public policy, it would set a sweeping and dangerous precedent if investors  
 16 could be subject to discovery as nonparties in cases involving alleged misrepresentations or  
 17 omissions by defendants in securities fraud cases. It would be even worse for fund administrators  
 18 like SS&C, which provides confidential accounting services for thousands of funds, to be  
 19 compelled to disclose confidential information about its clients. This is especially true if courts  
 20 were to reward parties with discovery from nonparties identified through subpoenas to regulators  
 21 like FINRA. Allowing such attenuated discovery would only embolden and encourage well-heeled  
 22 parties to cast broader nets for information like trading records and investor identities from  
 23 nonparties, including from regulators and financial institutions, which is the type of misuse of the  
 24 subpoena power from nonparties that Rule 45(d) was designed to protect against. See Fed. R. Civ.  
 25 P. 45, advisory’s committee note to 1991 amendment; *Lemberg Law*, 2016 WL 3231300, at \*5.  
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1 In addition, requiring disclosure of nonparties' investors and their trading activity in  
 2 securities cases could chill investors from engaging in speech about public companies and deter  
 3 them from trading in securities generally. Investors, analysts, and agents of funds rightly concerned  
 4 about being dragged into private civil litigation should not have to worry about potential disclosure  
 5 of their identities, communications, and work product based solely on their trading positions in  
 6 public securities markets.  
 7

### 8 CONCLUSION

9 For the above reasons, Movants respectfully request that this Court quash the Subpoenas.  
 10 If this Court is not inclined to do so, then it should transfer to the issuing court for further  
 11 consideration.

12 Dated: October 3, 2018

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 3rd day of October 2018, a true and correct copy of the foregoing was filed with the Clerk of the United States District Court for the Northern District of California and was served on counsel for Steven Sugarman at the following address:

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Service was effected by sending a true copy of the foregoing document and exhibits overnight in a sealed envelope, addressed as stated above, with fees for delivery. A courtesy electronic copy of the foregoing was also sent via email to counsel at the above address.

I declare under penalty of perjury that the foregoing is true and correct.

Executed October 3, 2018.

/s/ Bryan K. Weir  
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